No. 80-756

In the

# Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD S. SCHWEIKER, Secretary of Health and Human Services, and Administrator, Health Care Financing Administration,
*Petitioners,*

v.

GRAY PANTHERS,
*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF *AMICUS CURIAE* OF THE STATE OF INDIANA, URGING REVERSAL

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## INTEREST OF AMICUS CURIAE

The State of Indiana has a vital interest in the outcome of the instant case, since Indiana has adopted and applied

both state regulations and a state statute pursuant to the regulations issued by the Secretary, which were challenged by the Respondent. At stake is the authority of the Secretary to promulgate regulations, under the provisions of 42 U.S.C. §1396a(a)(17), which concern Medicaid eligibility for married persons and the calculation of their income and resources. These regulations permit states such as Indiana to adopt as a matter of policy certain procedures for taking into account the income and resources of an applicant's spouse and for considering that income and resources to the extent the individual states would have done so in 1972 under their state plans.

Indiana believes that Congress intended to permit states which choose to do so to retain eligibility criteria from the state plans of January 1, 1972, as an incentive, to assure that these states will continue to participate in the Medicaid program. Absent this option, a greater financial burden would fall upon the states—a burden which some states could ill afford to bear in today's difficult economic times. Indiana, as a participant in the Medicaid program, is bound by law to comply with federal statutes and regulations concerning the program. The result of a decision invalidating the challenged regulations would be to enlarge suddenly and greatly the cost of participating in the Medicaid program, since Indiana's statutory and procedural framework for determining income and resources would fall as lacking authority in federal law.

Indiana is among the states which chose to implement the congressional option and retain its 1972 eligibility standards. If the regulations are stricken, this option would effectively be eliminated, and both the State and its citizens would be faced with the prospect of having to make greater expenditures to remain within the program, or to attempt to obtain funds elsewhere. Indiana therefore files its brief *amicus curiae* in the belief that the Secretary had the authority to adopt the regulations challenged herein and

may have been obliged to do so to effectuate congressional intentions. Both the district court and the appellate court ignored these critical concerns in finding for the Respondent.

## ARGUMENT

### I. The Secretary acted within his authority in adopting regulations which provide guidelines as to the consideration of income.

The decision of the Court of Appeals for the District of Columbia Circuit demonstrates both the complexity of the issue of Medicaid eligibility and benefit calculation and the confusion of many courts as to the so-called practice of "deeming." The term requires considerable discussion, since no aspect of the Medicaid program can be viewed in isolation.

As is often stated, Medicaid is a cooperative state-federal program which was created in order to assure that needy persons would, under specific criteria, have access to medical care in the form of a wide range of preventive, diagnostic, and ameliorative services. Prior to January 1, 1974, participating states were permitted to operate programs for the benefit of the "categorically needy", including the aged, the blind, the disabled, and families with dependent children. On that date, the federal Supplemental Security Income (SSI) program began, with benefits paid by the Secretary of the then-entitled Department of Health, Education, and Welfare (hereinafter "the Secretary") to persons in the first three of the above categories under federal eligibility criteria. 42 U.S.C. §1381 *et seq.* The participating states had since the enactment in 1965 of the Medicaid program been obliged to provide medical assistance to all persons receiving benefits under the three categories replaced by SSI as well as to recipients of Aid to Families with Dependent Children (AFDC). Since the various state programs contained some differences in the amount of income and resources an

applicant could have in qualifying for assistance, the new SSI provisions would in some states have resulted in a much greater number of persons being found eligible for benefits with accompanying medical assistance. 42 U.S.C. §1396a(a)(10).

States were as a result provided an option, often referred to as the 209(b) option since the latter number was the designation of the option in the 1972 amendments to the Social Security Act. P.L. 92-603; 42 U.S.C. §1396a(f); Appendix, Petition for Certiorari, at 36a. Under this section, each participating state could choose to continue to determine eligibility for medical assistance of blind, aged or disabled persons under the income and resource standards in effect on January 1, 1972. States which retained these historical eligibility criteria are generally called "209(b) states," while the states which rely solely upon SSI eligibility criteria for determining who shall receive medical benefits are labelled commonly the "SSI states."

Important differences separate the 209(b) states from the SSI states. Prominent among them is the requirement that state plans in the 209(b) states include a "spend-down" provision, so that persons whose incomes are too high to qualify under state eligibility rules can contribute this excess income toward their care and thereby obtain medical assistance. 42 U.S.C. §1396a(f); *Williams v. St. Clair*, 610 F.2d 1244 (5th Cir., 1980). A second major distinguishing fact becomes apparent in the calculation of an applicant's income and resources, where the applicant is married, following differentiating regulations effective April 13, 1977. 45 C.F.R. §248.3. In SSI states, the income and resources of each spouse, where both apply or are eligible for benefits, are considered to be available to support the other while they actually live together and for six months after the month in which they cease to live together. 42 C.F.R. §435.723; *Norman v. St. Clair*, 610 F.2d 1228 (5th Cir., 1980), *cert. pet. pending*. If only one of the

spouses is eligible for SSI, and they cease to live together, under regulations in effect when this case was instituted, the income and resources of the other spouse cannot be considered available to the applicant unless the income and resources are actually contributed after the month in which they cease to live together. *Id.*

On the other hand, 209(b) states must observe the dictates of 42 U.S.C. §1396a(a)(17)(B) and (D), which provide that only "available income and resources" be considered in regard to an applicant or recipient and that the financial responsibility of any individual except the applicant's spouse or, where the applicant is a child who is blind or disabled or is under 21 years old, parent, must be disregarded. 42 U.S.C. §1396a(f); *Norman, supra.* The statute places the responsibility for setting guidelines for the states and for approving state plans with the Secretary. 42 U.S.C. §1396a(a)(17)(B),(D). There is no cut-off date after which the applicant's spouse's income can no longer be considered; the spouse or parent could therefore be expected to continue to contribute after the six-month SSI state period has expired. There are two separate questions to be decided in a thorough analysis of the so-called "deeming" issue. First, it must be determined if the Secretary could issue regulations to structure the 209(b) states' approaches to the matter; that is, it must be decided if "deeming" is permissible. Second, it must be determined how, in a general way, this process is to occur. The specific details involved in the calculation are left to the states.

The explicit language of the statutory section, set forth at page 35a of the Appendix to the Petition for Certiorari, requires that the Secretary set standards. 42 U.S.C. §1396a(a)(17)(B) and (D). The import of subsection (D) is clear; since it says that no person other than a spouse or a parent can be held financially responsible, the implication is inescapable that a spouse or parent *can* be declared responsible. 42 U.S.C. §1396a(a)(17)(D). If that necessary conclusion is not reached, a cardinal tenet of statutory

construction would be ignored: the courts must give effect to every portion of a statute to achieve legislative intent, since the goals of Congress are to be implemented. *Colautti v. Franklin*, 439 U.S. 379 (1979); *United States v. Kimbell Foods, Inc.* 440 U.S. 715 (1979), on remand *U.S. v. Crittenden*, 660 F.2d 478 (5th Cir., 1979).

It has been stated that it is what Congress intended, not what courts may feel, that should determine what is appropriate to the regulatory process. *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977); *National Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 186 U.S. App.D.C. 147 (C.A.D.C., 1977). The administrative agency, to whom Congress has delegated the operation of its programs, must be afforded considerable discretion in choosing the methods the agency finds are appropriate for each program. *Tennessee Gas Pipeline Co. v. Fed. Energy Regulatory Commission*, 606 F.2d 1094, 196 U.S.App.D.C. 161 (C.A.D.C., 1979) *cert den.* 445 U.S. 920. The agency, because of its intimate knowledge of each program, has a peculiar competence as to determinations regarding statutory implementation. *Fuhrman v. Dow*, 540 F.2d 396 (8th Cir., 1976). Thus, deference to an agency interpretation should be the rule, absent an indication that the agency's choice is '...unwarranted in law or without justification in fact.' *Noell v. Bensinger*, 586 F.2d 554, 558 (5th Cir., 1978); *Quern v. Mandley*, 436 U.S. 725 (1978).

It is reasonable to conclude that Congress intended to permit the Secretary to promulgate regulations which would clarify and document a small part of an exceedingly complex program. The legislative branch cannot be expected to enact statutes which deal minutely with each part of the income—resources calculation. As this Court declared, in *Batterton v. Francis*, 432 U.S. 416, 425 (1977):

> In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts

> regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner. American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 235-237, 57 S.Ct. 170, 172, 81 L. Ed. 142 (1936).

Here, the Secretary has taken a common-sense approach in adopting regulations which permit the consideration of available spousal income and resources, in the knowledge that the 209(b) option was necessary to assure certain states' participation in the medicaid program. *See* S.Rep.No. 404, 89th Cong., 1st Sess. 4, *reprinted in* [1965] U.S.C.C.A.N. 1943, 2018; [1972] U.S.C.C.A.N. 4989, 5013, 5187. The expectation of spousal contribution is reasonable and necessary.

Furthermore, 42 U.S.C. §1396a(a)(17) and 42 U.S.C. §1396a(f) do not by their wording or by implication apply only to states which have spousal or relative responsibility laws. *Herweg v. Ray*, 619 F.2d 1265, 1272 (8th Cir., 1980), *cert. pet. pending*. Nor do these statutory sections require an actual contribution of income or resources; as the *Herweg* court stated, no reach of the imagination can equate "available" with "actually contribute." *Herweg, supra*, at 1271-1272. The statutes likewise do not require that an unwilling spouse must be sued in order to effect contribution. By necessary implication, then, a 209(b) state might as reasonably determine the amount to be contributed and to enforce that decision through medical assistance regulations, at such lower expense and at much less inconvenience, as through financial responsibility laws. *Norman v. St. Clair, supra*, at 1237. The Secretary just as reasonably concluded that regulations implementing that statutory scheme should be adopted, to enact more fully the intent of Congress and to channel the otherwise undirected discretion of the 209(b) states. The regulations provide particular guidance to states such as Indiana, whose spousal support law in inapplicable in this area. I.C. (1978) 31-1-9-10.

Since the regulations herein concerned followed statutory wording quite closely, it is difficult to see how such regulations could be called arbitrary, capricious, or

otherwise defective as a matter of law without any real challenge to the underlying statute. The law allows states to choose to utilize eligibility standards of January 1, 1972, to determine who should receive medical assistance, including in the income-resource calculation available income of a spouse or of a parent of a minor or blind or disabled child. 42 U.S.C. §1396a(a)(17)(B), (D); 42 U.S.C. §1396a(f). The regulations state that, in a manner not more restrictive than was employed on January 1, 1972, the available income of a spouse ( or parent of a minor or blind or disabled child) may be considered in determining an applicant's eligibility. 42 C.F.R. §§435.723, 435.734, 436.602. If the above-cited statutes are proper, the regulations must be legitimate as well. The apparent contention that the statutes permit if not require the enforcement of spousal or relative responsibility laws, while the regulations cited above cannot be utilized in the same manner as would be adopted and approved in each 209(b) state plan, is artificial and unrealistically burdensome.

The Secretary has adopted regulations which are reasonably related to legitimate ends, and their validity must be upheld. *Mourning v. Family Publications Service*, 411 U.S. 356 (1973), 42 U.S.C. §1302.

## II. The so-called practice of "deeming" may be accomplished in a permissible manner.

The Respondent herein has adopted the use of "deeming" as a label for the process undertaken and continued by the 209(b) states, which label connotes as a sort of code word an administrative practice which to Respondent can never be proper. That is, the sense of the phrase "consider available income" has been replaced by what has been presented as a frightening and automatically inexcusable distortion, "deeming." This is a trap into which several unwary, unquestioning, or overly hasty commentators—and some courts—have fallen. The label has been applied in a general manner to the procedures of the 209(b) states, ignoring the fact that the income calculation rules are slightly different

in each. An overly vague term such as "deeming" is but a catchword, failing to deal with specifics of the eligibility computation and obscuring the need for a fiscally and legally reasonable approach to the medical assistance area.

To say simply that "deeming" is always impermissible is to neglect both the normal goal of construing statutes—and here regulations—so as to allow them to be upheld and the usual flexibility in interpreting such noncriminal statutes which the courts employ to ensure agency freedom to act. It is the conclusion of many courts that a reasonable and factual evaluation of a noninstitutionalized spouse's income and resources can properly justify an expectation of contribution, whereas an arbitrary presumption cannot be supported. *Herweg, supra*, at 1269-1270; *Norman, supra*, at 1240-1242; *Franssen v. Juras*, 406 F.Supp. 1375, 1379 (D. Or., 1975). The *Norman* decision goes farther in upholding a uniform needs allowance to be protected for the ineligible spouse. *Norman*, at 1232, 1242-1243. The Fifth Circuit Court of Appeals recognized that a non-standard expense deduction scheme might unduly benefit the wealthy spouse who could shift all income and resources to the other spouse, who might incur unnecessary or extreme expenses to keep from making contribution. *Norman*, at 1238. In light of such potential administrative obstacles, including the decision as to what expenses could be seen as "acceptable" in kind and amount, this standardized approach may be more effective as a means of assuring enforcement.

However, the statute mandates that the states *consider* the ineligible spouse's income, with no requirement of individualization, to the extent it is available. If that is "deeming," the fault lies with the statute and the existence of the 209(b) option. Indiana, however, believes the statutory language suffices to convey the intent of Congress. It seems that the real issue is procedural and definitional, not the propriety of considering spousal income. Thus, it is difficult to see why the Secretary's

regulations cannot be interpreted, consistent with constitutionality, in a flexible way to do what Congress did not preclude. It must be presumed that Congress intended the result actually achieved, since the statutes have not been amended.

The matter of just how the 209(b) states may calculate income and resources requires an examination of each state's adminstrative framework, since the federal regulations are more general in stating that available income may be considered. That careful scrutiny is not a component of this cause, which does not refer to state procedures. In light of the questionable standing of the Respondent to make its blanket charge of the invalidity of the federal provisions, the Court should act consistently with the long-standing policy of deference and accept the agency's choice of methods. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980); *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975); *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977). As was noted in *Dandridge v. Williams*, the choice for states as well as for the federal government is whether to support some persons adequately and some less so, or to give insufficient funds to everyone but give a small amount to more individuals. 397 U.S. 471 (1970). A third choice, in these difficult economic times, may be to cease giving any assistance at all. The latter should be avoided if possible, for the needs of many citizens continue to grow; all potential and reasonable sources of funds to help reach the goal of preventing utter destitution for as many persons as possible must be reached.

## CONCLUSION

As the Petitioners will thoroughly set forth the statutory analysis necessary to the disposition of this matter, the State of Indiana would not burden the Court by repetition. Instead, the State must respectfully urge with the Petitioners that, as a matter of legal and logical necessity, the decision of the Court of Appeals for the District of Columbia Circuit be reversed and the validity of the Secretary's regulations declared.

Respectfully submitted,

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